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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 Katie Foster,

10 Plaintiff,

11 v.

12 Wells Fargo Bank NA,

13 Defendant.

No. CV-13-01701-PHX-GMS

**ORDER**

14 Pending before the Court is Defendant Wells Fargo Bank NA's Motion to  
15 Dismiss. (Doc. 8.) For the following reasons, the Motion is granted.

16 **BACKGROUND**

17 This case arises from a letter from Defendant Wells Fargo approving a short sale  
18 of real property by its owner, Shelly Ulestad ("Ulestad"), a non-party to this lawsuit.  
19 Ulestad owned real property in Phoenix, Arizona. She reached an agreement with  
20 Plaintiff Kate Foster to sell that property to Plaintiff in a short sale. Ulestad and  
21 Plaintiff's purchase contract contained a short sale addendum, which made clear that the  
22 purchase contract provided a price for the property that would not fully satisfy either the  
23 outstanding balance of Ulestad's mortgage on the property, obtained through Wells  
24 Fargo, or the second lien against the property held by Desert Schools Federal Credit  
25 Union. (Doc. 1-1 ¶ 6.) Thus, the sale would not go forward until Ulestad received  
26 permission from both lenders. (*Id.*)

27 Ulestad sought approval of the short sale. In response, in a letter dated May 13,  
28 2013 (the "short sale approval letter"), America's Serving Company, Wells Fargo's loan

1 servicer and a division of Wells Fargo Home Mortgage, approved the short sale  
2 transaction as long as Ulestad met certain requirements. (Doc. 1-1 at ¶ 11.) The letter  
3 stated that if the requirements were met, Wells Fargo would approve the short sale, pay a  
4 certain amount of the second mortgage to Desert Schools Federal Credit Union, and  
5 ultimately release Ulestad from her Wells Fargo mortgage. (*Id.* at ¶¶ 13–15.) To comply  
6 with the letter’s requirement that the sale be an arm’s length transaction, both Foster and  
7 Ulestad signed an affidavit dated May 14, 2013, avowing that the sale was at arm’s  
8 length. (*Id.* at ¶ 10.)

9 Ulestad and Plaintiff continued to go forward with the transaction and prepare for  
10 the close of escrow. (Doc. 1-1 ¶ 11.) Plaintiff alleges that Wells Fargo did not indicate  
11 that there was any problem with the transaction at this time. (*Id.*) On July 10, 2013, Wells  
12 Fargo provided the final approval necessary to close escrow. (*Id.* ¶ 12.) On July 12, 2013,  
13 Plaintiff and Ulestad closed escrow and lien payments were sent to Wells Fargo and to  
14 Desert Schools Federal Credit Union. (*Id.* ¶ 13.) On this same day, Wells Fargo contacted  
15 Plaintiff and told her that there were problems with the transaction and that they would  
16 not provide a release of their lien on the property to complete the sale. (*Id.* ¶ 15.) The  
17 problems identified by Wells Fargo were that title to the property had inappropriately  
18 been placed into a trust, in violation of the short sale approval letter, and that Plaintiff had  
19 reached an agreement to sell the property to a third party after the short sale closed, in  
20 violation of the arm’s length affidavit. (*Id.* ¶ 16.) On July 15, 2013, the next business day  
21 after the close of escrow, Wells Fargo returned the payoff funds. (*Id.* ¶ 17.) At some point  
22 later, Wells Fargo noticed a trustee’s sale of Ulestad’s property through its trustee, First  
23 American Title, scheduled for July 25, 2013. (*Id.* ¶¶ 22.)

24 Plaintiff filed the present action against Wells Fargo in Maricopa County Superior  
25 Court on July 24, 2013. (Doc. 1-1.) She alleged breach of contract and breach of the  
26 covenant of good faith and fair dealing, sought declaratory relief that the short sale  
27 approval letter was a payoff statement and that she was entitled to specific performance,  
28 and sought injunctive relief to enjoin the July 25 trustee’s sale of the property for the

1 pendency of the suit. (*Id.*) Plaintiff also filed a Motion for a Temporary Restraining Order  
2 to halt the July 25 sale. (Doc. 1-1 at 31.) Later on July 24, Maricopa County Superior  
3 Court Judge Robert Oberbillig granted Plaintiff's Motion for a Temporary Restraining  
4 Order, pending a hearing on the matter scheduled for July 30. (Doc. 1-1 at 34.) The  
5 record indicates that this hearing was postponed, but the record does not indicate when, if  
6 ever, the hearing occurred. (Doc. 1-1 at 43–47.) On August 16, 2013, Defendant removed  
7 the case to this Court. (Doc. 1-1 at 27.)

8 Defendant now moves to dismiss on the grounds that Plaintiff's allegations do not  
9 support the existence of any contract between Plaintiff and Defendant and on the grounds  
10 that the short sale approval letter was not a payoff statement, and thus cannot be enforced  
11 by Plaintiff. (Doc. 8.)

## 12 DISCUSSION

### 13 I. LEGAL STANDARD

14 Rule 12(b)(6) is designed to “test the legal sufficiency of a claim.” *Navarro v.*  
15 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal for failure to state a claim  
16 pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain more than  
17 “labels and conclusions” or a “formulaic recitation of the elements of a cause of action”;  
18 it must contain factual allegations sufficient to “raise a right to relief above the  
19 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a  
20 complaint need not contain detailed factual allegations . . . it must plead ‘enough facts to  
21 state a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*,  
22 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has  
23 facial plausibility when the plaintiff pleads factual content that allows the court to draw  
24 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*  
25 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Plausibility  
26 requires “more than a sheer possibility that a defendant has acted unlawfully.” *Twombly*,  
27 550 U.S. at 555. Accordingly, a plaintiff must do more than employ “labels,”  
28 “conclusions,” or a “formulaic recitation of the elements of a cause of action.” *Id.*

When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However, legal conclusions couched as factual allegations are not given a presumption of truthfulness, and “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

## II. APPLICATION

Defendant moves to dismiss on the grounds that Plaintiff has failed to state a cognizable claim because she has failed to plead sufficient facts to establish that there was a valid and enforceable contract between Plaintiff and Defendant. In addition, Defendant argues that the short sale approval at issue in this case does not meet the statutory definition of a payoff statement under Arizona law.

### A. The Letter is Not a Contract Between Plaintiff and Defendant

Defendant first moves to dismiss on the grounds that, if the short sale approval letter is a contract, Plaintiff is not a party to that contract. Plaintiff asserts claims of breach of contract and breach of the covenant of good faith and fair dealing. (Doc 1-1 ¶¶ 25–36.) These claims are both predicated on Plaintiff’s allegation that the short sale approval letter sent from Defendant to Ulestad is a valid and enforceable contract to which Plaintiff is a party. (*Id.* ¶¶ 26, 33.) The short sale approval letter is dated May 13, 2013, and addressed to Ulestad. (*Id.* at 11.) The letter states that “[t]his Notice of Short Sale Approval provides all of the conditions and requirements that must be met before the short sale transaction can be finalized.” (*Id.*) It goes on to describe these requirements, including that the sale be an arm’s length transaction. It notes that “[f]ailure to comply with any of the conditions/requirements included in this Notice could result in our refusal to issue a satisfaction, release or conveyance of your mortgage.” (*Id.* at 14.) The only reference to Plaintiff in the letter is a reference to the purchase contract between Ulestad and Plaintiff. (Doc. 1-1 at 12 (“This approval is based on the purchase contract dated

1 02/01/2013 between SHELLY ULESTAD, the seller(s), and KATIE FOSTER, the  
2 buyer(s), for a purchase price of \$173,500.000.”))

3 Assuming the letter constituted a unilateral contract, as Plaintiff alleges, Plaintiff  
4 does not plead sufficient facts to establish that she was a party to that contract. Plaintiff  
5 states that she must be a party to the contract because “the vast majority of the  
6 performance required under the letter is from Plaintiff.” (Doc. 13 at 5.) While the short  
7 sale approval was certainly based on Ulestad’s separate purchase contract with Plaintiff,  
8 the terms of the letter only obligate its recipient, Ulestad. The letter lists the conditions  
9 that “the borrower/seller must meet” (Doc. 1-1 at 11–12) and requires that the seller  
10 complete certain paperwork (*Id.* at 13–14). The letter references the approved sale price  
11 and seller costs from the purchase agreement with Plaintiff, but does so in the context of  
12 instructing Ulestad what steps she must take to obtain final approval of that sale and  
13 ultimately receive a release of her mortgage.

14 While Plaintiff may be correct that Defendant would not have issued the letter to  
15 Ulestad if Ulestad had not entered into the purchase contract with Plaintiff, it does not  
16 follow that Plaintiff becomes the promisee of the contract between Ulestad and her  
17 lender. *See Watson Const. Co. v. Amfac Mortgage Corp.*, 124 Ariz. 570, 579, 606 P.2d  
18 421, 430 (Ct. App. 1979) (quoting 1 Corbin on Contracts § 21.52 (1963)) (“In the case of  
19 a unilateral contract, there is only one promisor; and the legal result is that he is the only  
20 party who is under an enforceable legal duty. The other party to this contract is the one to  
21 whom the promise is made, and he is the only one in whom the contract creates an  
22 enforceable legal right.”) “[P]rivity of contract must exist before a party may seek to  
23 enforce a contract . . .” *Goodman v. Physical Res. Eng’g, Inc.*, 229 Ariz. 25, 30, 270 P.3d  
24 852, 857 (Ct. App. 2011) (discussing *Stratton v. Inspiration Consol. Copper Co.*, 140  
25 Ariz. 528, 529–30, 683 P.2d 327, 328–29 (App. 1984)). As Plaintiff does not allege facts  
26 that establish such privity of contract, she is unable to bring her claims based on that  
27 contract.  
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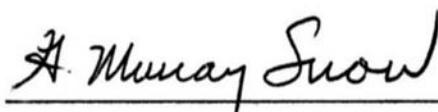
1           **B. The Letter is Not a Payoff Statement**

2           Defendant next moves to dismiss Plaintiff's claim for a declaratory judgment  
3 stating that the short sale approval letter constitutes a payoff statement and that Plaintiff  
4 is entitled to specific performance pursuant to that payoff statement. (Doc. 1-1 ¶¶ 37–41.)  
5 Under Arizona law, a payoff demand statement is "a written statement that is prepared in  
6 response to a written demand made by an entitled person or that person's authorized  
7 agent that sets forth the amounts required by the secured lender to fully satisfy all of the  
8 obligations secured by the loan that is the subject of the demand." Ariz. Rev. Stat. Ann.  
9 § 33-715(J)(4). Here, the short sale approval letter was issued in response to Ulestad's  
10 request for permission to do a short sale. By definition, this was a request to sell her  
11 property for less than the outstanding balance of the debt owed to Defendant. The short  
12 sale approval letter outlines Defendant's conditional approval for Ulestad to proceed with  
13 the short sale even though the short sale would not, as the statute requires, "fully satisfy  
14 all the obligations secured by the loan." The short sale approval letter does not meet the  
15 statutory definition of a payoff statement. Thus, Plaintiff cannot be entitled to specific  
16 performance under the statute. Therefore,

17           **IT IS ORDERED** that Defendant Wells Fargo's Motion to Dismiss (Doc. 8) is  
18 granted.

19           **IT IS ORDERED** directing the Clerk of Court **terminate** this action and enter  
20 judgment accordingly.

21           Dated this 10th day of March, 2014.

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23           \_\_\_\_\_  
24           G. Murray Snow  
25           United States District Judge  
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